JD–78-17
Austin, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SECURITAS SECURITY SERVICES USA

and **CASES 16–CA–176006**
16–CA–183494

RYAN PATRICK MURPHY, An Individual

Robert Perez, Esq. and *Maxie Gallardo, Esq.*
for the General Counsel.
Maurice Baskin, Esq. (Littler Mendelson, PC
Washington, DC), for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Austin, Texas on April 27, 2017. The Charging Party, Ryan Patrick Murphy (Murphy), filed the charges giving rise to these cases on May 12 and August 31, 2016.[1] The General Counsel issued the Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing on April 7, 2017.

The General Counsel alleges that Respondent has violated Section 8(a) (1) of the Act by maintaining unlawful employee handbook policies banning recording and cameras at work; promulgating and maintaining a rule prohibiting gossip, nonwork-related idle talk and rumor spreading; and prohibiting an employee from discussing internal investigations.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

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[1] All dates are in 2016 unless otherwise indicated.

[2] Subsequent to the trial in this case, the parties entered into a partial bilateral informal settlement agreement resolving several of the unlawful rules allegations. I approved the agreement, and granted their joint motion to sever those allegations from this case. The severed, resolved allegations include Respondent's confidential information policy (complaint paragraph 6), proprietary information policy (complaint paragraph 8) and social networking policy (portion of complaint paragraph 7).

FINDINGS OF FACT

I. JURISDICTION

Respondent owns and operates a corporation with an office and place of business in Austin, Texas, where it provides security services to other companies. In conducting its operations in 2015, Respondent performed services valued in excess of $50,000 in states other than the State of Texas. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Business

Respondent is the second largest security service provider in the country, with about 14,000 customers and 90,000 security guards/officers. It provides its customers with guards, as well as a variety of security services and products. In the Austin, Texas area, Respondent provides security guards to two Samsung facilities—the Samsung Austin Research Center and the Samsung Austin Semiconductor Plant. Respondent employs about 110 employees at both locations, with branch manager Joe Shuler over area operations. This case involves occurrences at the Austin Research Center, where Respondent employs about 10 guards, with 2 guards and a shift supervisor on each shift.

B. Respondent's Security Officer Employee Handbook Policy

Respondent maintains a Security Officer Handbook, updated in January 2015. (Jt. Exh. 1). This employee handbook contains an acceptable usage and electronic communications policy, which, relevant to this case, bans all recordings of communications at any time, including disciplinary sessions and investigations. It also bans any and all picture taking while on duty, with cell phone cameras and/or any other photographic or video devices, unless required or directed by post orders or a supervisor or manager.[3] Respondent presented extensive testimony through Michael Pope, its deputy general counsel, as to why these rules are necessary to maintain the integrity of its unique security business with a primary focus on its "golden rule" of protecting clients' employees, property and information. He explained that some of Respondent's clients, such as hospitals, require heightened, specialized levels of security to protect patients, medical records and hospital visitors, and that others require security of information connected with national defense. Customers also include, but are not limited to, high rise apartment and condominium complexes, industrial centers, college campuses, homeowners' associations, theme parks, corporate headquarters, fast food restaurants and high-tech facilities. In sum, he emphasized that Respondent deals with many confidentiality and privacy issues associated with different types of industries, and that their handbook rules at issue help reduce the risk of losing clients or compromising the mission due to a loss of confidence in Respondent's security program.

[3] These rules will be set forth and discussed further in the analysis section of this decision.

Pope explained that their clients do not want their people, property/facilities and information to be publicly revealed through audio and video recordings or pictures taken by Securitas employees. He testified that the rules at issue in this case protect against the possibility of security guards being bribed or blackmailed to steal clients' property and information (presumably with assistance by these guards to record and/or photograph security cameras, the comings and goings of chief officers, the inner workings of clients' facilities, client conversations and secret information) for the benefit of outsiders or client insiders with ill intent. He also believed that the rules prevent security officers from taking and publicly posting pictures of each other "goofing around." (Tr. 74, 83–85, 92–97, 113–114). He maintained that their security policies and protocols are the best, and have been reviewed and vetted by retired law enforcement officials, state regulatory agencies and the Department of Homeland Security (DHS), and meet the highest standards in the security industry.[4] However, he acknowledged that the handbook rules at issue would prohibit employees from immediately taking photographs or making recordings to document an unsafe working condition or discriminatory discipline without prior authorization from management. He did not believe that employees would be disciplined for doing so if they were "carrying out their duties properly," but admitted that Respondent does not inform employees that they may engage in recording and picture taking under those circumstances, without punishment. (Tr. 134–136).

C. Respondent Bans Employees From Discussing Internal Investigations and From Gossiping and Nonwork-Related Idle Talk

The Charging Party, Murphy, worked as a security officer for Respondent at the Samsung Research Center from August 2015 to August 2016.[5] His duties included conducting entry and exit control of personnel and items, monitoring the facility via closed circuit television, providing customer service and responding to incidents. Murphy worked his shift with two other officers—Amanda Marino[6], shift supervisor, and David Brown, security officer. As stated, Joe Shuler managed the facility. Tennille Gray was the human resources manager.[7]

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[4] For example, Respondent introduced evidence through Pope to show that the handbook rules had been reviewed and vetted by the DHS in order for Securitas to receive a certificate of conformance as a security provider under the Safety Act. However, Pope admitted on cross-examination that he was not sure what industries the Safety Act applied to, and that it would not apply, for example, to a client who ran a chicken farm. There is no evidence that the Safety Act, DHS or any other regulatory or industry guidelines required Respondent to promulgate or maintain these rules as written, or that Samsung required such rules or required the guards at its Austin research center to sign confidentiality or non-disclosure agreements. (Tr. 63–68, 125–129; R. Exhs. 1–3).

[5] Murphy voluntarily resigned.

[6] Marino's last name is misspelled in the transcript.

[7] Respondent admits, and I find, that for all relevant times, Marino, Shuler and Gray have been supervisors and/or agents of Respondent within the meaning of Section 2(11) and Section 2(13) of the Act.

On April 26, 2016, Murphy was involved in and/or witnessed an incident that resulted in another employee, David Brown, filing a race discrimination complaint and the company initiating an investigation. (Tr. 30–31, 122–123, 127). On May 5, branch manager Shuler and a human resources representative, Pablo Gonzalez, interviewed Murphy regarding the April 26 incident. He did not know that a discrimination complaint had been filed, but understood the investigation to be about an argument that occurred on April 26. (Tr. 45). While questioning Murphy, they orally instructed him not to discuss the investigation or incident with anyone.[8] They also asked him to submit a written statement, which he emailed to human resources manager Gray on May 6. Murphy attached to his email a number of specific questions about the directive not to discuss the investigation or incident. He asked the following:

> First, are you barring me and any other officer who is assigned to SARC from discussing this matter in perpetuity? Is it just while you are investigating it? Are there specific individuals with whom this bar is attached or is it a blanket prohibition among every security officer? Does the prohibition to talk just include this incident or does it include other work related matters? What is the intent of this prohibition? Does the prohibition only apply during work hours and on site, or am I, and every other officer prohibited from speaking about this incident amongst ourselves regardless of the setting? Lastly, what are the possible ramifications that I or any other officer may face if we fail to adhere to this prohibition?
>
> If I don't receive a response, I'll assume that the prohibition to not talk about this incident applies to myself and every officer assigned to SARC [Samsung Austin Research Center] regardless of the timing or the setting. If this prohibition was in fact [erroneous], it is my hope that I, along with every officer on site [receives] education on this matter.

(Tr. 31–34; GC Exh. 2). On the same day, Respondent issued a memorandum promulgating the following rule, which it has since maintained:

> Memo: <u>Excessive none [sic] related idle talk/rumor/gossip in the work place</u>
>
> Please refrain from gossiping and excessive none [sic] work related idle talk and rumor spreading while in the work place. Remain vigilant and helpful and keep our conversations professional, the work place [is] not the place for gossip and idle talk.
>
> <u>Securitas Officer Handbook Actions That Warrant Immediate Termination of Employment, page 88, Line item #10</u>

[8] Pope testified that this was not a policy "which is kind of the Bible of the Company," but "words out of that particular manager's mouth on that particular day." (Tr. 139). However, Gray made it clear in a subsequent email to Murphy (discussed below) that this was the company's policy to all employees. (GC Exh. 2).

> Disruptive or inappropriate conversation at work.
>
> Actions That May Result in Warning Prior to Termination of Employment page 91 Line item #6
>
> Abusive, foul or inappropriate language.
>
> Acknowledge by signing:

(Jt. Exhs. 2–3 and 1).

On May 9, Murphy emailed Shuler (copied to Gray and Marino), indicating that he did not receive a response to his May 6 email inquiry. He also advised that a few hours after he sent his May 6 email to Gray, his supervisor, Marino printed out the ban on gossip and idle talk memo, and instructed him to sign it. He acknowledged that he had read the form, but that he would not sign the document "under any circumstances."[9] (GC Exh. 2). Murphy testified that he told Marino that, "if I had a choice between signing the memo and keeping my job and not signing it and getting fired, I told her that I would rather quit." (Tr. 35).

Later that morning, Gray emailed Murphy thanking him for his statement, and responding to his May 6 email inquiries as follows:

> In regards to your questions, all are barred from talking during the time of the investigation in any circumstance. After the investigation is concluded – if any one starts conversing about it and those conversations become a distraction to the workplace anyone involved in conversing could face disciplinary action in accordance with the handbook.

(GC Exh. 2).[10] Gray also sent a second email to Murphy on May 9, informing him that, "[a]s long as you have read and acknowledged that you read and received the memo concerning Rumors it is your option to sign the document but the policy will still apply. In regards to your question below, I responded to you separately this morning." She reiterated the ban on and warning about anyone discussing the investigation. (Id.) Thus, there is no doubt that this policy prohibiting discussion about the investigation applied to "all" employees.

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[9] Of note, Murphy testified that Marino only showed him the memo on the computer, and that he later saw the paper copy, posted above the security officers' sign-in sheet, with a document next to it instructing to read and sign. There was no dispute that this memo was issued for all of the guards at the research center facility. (Tr. 35, 145–148).

[10] On the same morning, Gray emailed David McAllister, Respondent's Vice President of Human Resources in Kennesaw, GA, informing him that they had investigated a hotline call, and "informed all Officers not to discuss the investigation with anyone." She sought his advice "to make sure that I respond" to Murphy's concerns "correctly." McAllister told her to tell Murphy that they were "barring him from talking during the time of the investigation in any circumstance," and that after it concluded, he could be disciplined if his discussions became a distraction in the workplace. (Jt. Ex. 4).

Murphy testified that he was concerned that the memo he was instructed to sign was "extremely broad and that people's jobs were going to be in jeopardy if they decided to actually follow through on the threat, you know, of disciplinary action." He stated that he discussed the memo with Marino, Brown and two fellow officers, Campbell and Nick Hassenzahl. He testified that they were all concerned, and that Campbell also sent an email to Shuler indicating that he would not sign the memo. (Tr. 36–37). Murphy further testified that he interpreted Gray's prohibition on discussing the investigation as prohibiting him from talking about "any work conditions at all" to any other employees. He gave an example of how discussions about a problematic supervisor would constitute a working condition, but might also be considered gossip. He disagreed that nothing in the aforementioned memoranda precluded him from discussing working conditions with fellow employees, and believed that nonwork-related idle talk would include communications about unionizing. (Tr. 39, 42–43, 46–49, 55). Nevertheless, Murphy never received discipline in connection with his refusal to sign the memo.

Pope, the only witness for Respondent, testified that he believed Respondent issued the memo prohibiting gossip and other nonwork-related idle talk because Brown had complained about employees gossiping about his complaint. In addition, he insisted that Respondent's rules and directives prohibiting gossip and idle chitchat, and requiring that employees not discuss (or record) internal investigations, are rock solid because they comply with the Equal Employment Opportunity Commission's (EEOC's) guidelines for investigating discrimination and harassment claims. He testified that Respondent, like the EEOC, wants to ensure that witnesses, like Brown, feel free to come forth and provide "unvarnished, untainted, uninfluenced" truthful statements. (Tr. 110–111, 122–124; R. Exh. 4).

III. DISCUSSION AND ANALYSIS

The Board has long recognized the right of employees to communicate in the workplace, which includes the right to discuss with each other hours, wages and other terms and conditions of employment. *Parexel Int'l.*, *LLC*, 356 NLRB 516, 518 (2011), citing *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996).

In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646 (2004). If it does not, a violation is established by showing that 1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to protected activity; and/or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. at 647. In addition, maintenance of the rule may be deemed unlawful even absent any evidence of enforcement. *Lafayette Park Hotel*, above at 825. The Board has explained that where an employer does not intend for a rule to extend to or prohibit protected activity, the employer's lawful intent must be "clearly communicated

to the employees." Id. at 828. Further, it is well settled that "any ambiguity in a rule must be construed against the Respondent as the promulgator of the rule." Id., citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

A. Respondent's Officer Handbook Rules violate Section 8(a)(1) of the Act.

Respondent's Acceptable Usage and Electronic Communications Policy rules on recording and cameras, maintained since November 9, 2015, state in relevant part as follows:

> • **Recording:** You may not record communications at work. Tape recording disciplinary sessions and/or investigations are not permitted.
>
> • **Cameras:** Employees must not take pictures while on duty unless required by Post Orders or when directed by your Supervisor or Manager. This applies to cell phone cameras and/or any other photographic or video devices.
>
> ****
>
> Note: Nothing in this policy is intended or should be construed to infringe upon an individual's legal rights or their right to engage in a protected concerted activity.

(Jt. Exh. 1 at 46; Jt. Exh. 3). The only question regarding these handbook rules is whether or not employees would reasonably construe them to prohibit Section 7 activity. There is no evidence that either of these rules was promulgated and maintained in response to union or other protected activity or expressly issued to restrict Section 7 rights.

I find both of these policies are overbroad, despite the savings clause at the end noting that it is not intended nor should it be construed to interfere with an individual's legal rights or right to engage in protected concerted activity. The recording policy forbids employees from recording any communications at all while at work, including disciplinary sessions and investigations. The cameras policy prohibits all picture taking and videotaping while on duty, regardless of location, without prior authorization. The Board has established that "employee photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid and protection and no overriding employer interest is present." *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4–5 (2015). The Board in *Rio All-Suites Hotel* cited examples of types of protected conduct potentially affected by such a rule, such as employees recording and documenting employees picketing, unsafe work equipment or conditions, discussions about terms and conditions of employment and discriminatory application of employer rules. Id, citing *Hyundai America Shipping Agency, Inc.,* 357 NLRB 860, 860, 871 (2011) enfd. in part and reversed in part, 805 F.3d 309 (D.C. Cir. 2015) (finding unlawful a rule barring employees from disclosing "information or messages" from company email, instant messaging and phone systems, except to "authorized persons."). In its finding, the Board also relied on *White Oak Manor*, 353 NLRB 795, 795 fn. 2, 798–799 (2009) (finding photography to be part of the "*res gestae* of employee's protected concerted activity in documenting inconsistent enforcement of employer dress code"), reaffirmed and incorporated by reference at 355 NLRB No. 211 (2010), enfd. 452 Fed.Appx. 374 (4th Cir. 2011); and *Sullivan, Long & Hagerty,* 303 NLRB 1007, 1013 (1991) (finding

tape recording in the workplace to support federal investigation protected), enfd. mem. 976 F.2d 743 (11th Cir. 1992). Id.

In *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 4–5 (2016), the Board overturned the judge's conclusion and relied on the decisions in *Rio All-Suites Hotel & Casino*, above, and *Whole Foods Market*, 363 NLRB No. 87, slip op. at 4 fn. 11 (2015) (finding unlawful a rule prohibiting all recording of conversations, calls, images or company meetings with a camera or other recording device without prior management approval) in finding that "employer rules broadly prohibiting recording in the workplace on employees' own time and in nonwork areas restricted Section 7 activity in violation of Section 8(a)(1) of the Act." In *T-Mobile*, the respondent's rule restricted employees from using cameras and audio and recording devices in the workplace without certain management authorization. The Board in *T-Mobile* determined that the respondent's rules were not justified by its "general interest in maintaining employee privacy, protecting confidential information, and promoting open communications." *T-Mobile*, above, slip op. at 5.

In this case, the rules do not indicate, explicitly or implicitly, that they are designed to protect the privacy of customers or other legitimate business interests. Rather, they unqualifiedly prohibit all workplace recording and any unauthorized photography. I find unpersuasive Respondent's argument and testimony (by Pope) that their security business is so unique and exceptionally linked to securing their clients' confidential information, employees and property that it is common sense that Respondent's employees would reasonably understand the rules to represent a legitimate means of protecting client privacy, and not as interfering with or prohibiting protected activity. The rules here, like those in *T-Mobile, Whole Foods Market* and *Rio All-Suites Hotel*, above, fail to differentiate between Section 7 protected recordings and photographing and those that are not protected. Further, Respondent's rules fail to qualify whether or not employees would be permitted to use their cameras or recording equipment to capture unfair labor practices in break or other nonworking areas or during nonworking, break or meal times.[11] The language "while on duty" in the cameras rule does not cure this defect. Thus, I find that employees would reasonably construe these broad rules to prevent them from documenting unsafe or hazardous working conditions, work injuries, inconsistent application of employer rules or other unfair labor practices.

I have considered all of Respondent's arguments in support of these rules, and reject them as insufficient justifications for the rules' broad restrictions. Respondent relies heavily on its savings clause at the end of these rules. First, Respondent argues that this case is distinguishable from the decisions in which the Board found similar policies unlawful because

[11] Thus, I dismiss Respondent's assertion that its recording and photography policies, unlike those in *Whole Foods Markets*, above, slip op. at 1, and *Rio All-Suites Hotel*, above, slip op. at 4, in that they explicitly limit recording in the workplace or during an investigatory session and photographing in the workplace while on duty. As previously stated, Respondent's rules do not distinguish between nonworking time and working time for recording, nor do they define what is meant while on duty or specify whether or not employees may take pictures during breaks or in nonworking areas.

the policies in those cases did not include similar savings clauses or language informing employees that the rules did not, and were not meant to, interfere with their protected concerted activity.[12] It is true that in some circumstances, "an employer's express notice to employees advising them of their rights under the Act may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule." See *First Transit, Inc.*, 360 NLRB 619, 621–622 (2014). However, I agree with the General Counsel in this case that the provision following the overly broad recording and cameras rules does not make them lawful.

In *First Transit, Inc.*, the Board found that the respondent's policy stating that the employer supported employees' right to vote for or against the union without 'influence or interference from management' was too narrow. It held that "[a]n effective 'safe harbor' provision of this kind, also referred to as a 'savings clause,' should adequately address the broad panoply of rights protected by Section 7." (Id.) The Board recognized that a savings clause clarifies the scope of an "otherwise ambiguous" policy, but that in the case before it, the savings clause failed to "ensure that employees would not read otherwise overbroad rules as restricting their Section 7 rights." Therefore, the question is whether or not employees would reasonably understand a savings clause to permit the type of protected activity that the rule associated with it implicitly bans. Although the savings clause in the instant case is placed directly underneath the rules it purports to address, I find that employees would not reasonably understand it to allow them to engage in protected activity as described above by documenting through recording or photography safety violations or unfair labor practices. Nor does Respondent's safety clause set forth any explanation or examples of protected activity such that employees understand in layman's terms what Respondent means by protected concerted activity. See *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994) (explaining that "rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the same expertise to examine company rules from a legal standpoint.")

I also reject Respondent's argument that this case is distinct from *G4S Secure Solutions*, 364 NLRB No. 92, slip op. at 5–6, where the Board held the employer's disclaimer was insufficient because it failed to inform employees that its policy did not prohibit conduct protected by Section 7. Respondent claims that its savings clause essentially tracks the language of Section 7 in its declaration that the policy would not infringe upon employees' right to engage in protected concerted activities. However, as stated above, the legal term "protected concerted activity" under Section 7 does not specify for employees examples of what protected concerted activities are permitted under the rules. Although the savings clause language identifies the particular federal law, it does not adequately clarify the scope of Respondent's overly broad rules.

In the same vein, I reject Respondent's contention that similar disclaimers were found sufficient to uphold the legality of challenged confidentiality and social media policies by an

[12] See R. Br. at 13–15, citing *Whole Foods Markets*, 363 NLRB No. 87, slip op. at 3; *G4S Secure Solutions*, 364 NLRB No. 92, slip op. at 5–6 (2016); *Rio All-Suites Hotel and Casino*, 362 NLRB No. 190, slip op. at 4; or *Verizon Wireless*, JD-40-17, slip op. at 11–13 (May 25, 2017).

administrative law judge (*Tiffany & Co*., Case No. 01–CA–111287, at 9–11 (Davis, ALJ Aug. 5, 2014)) and in a Division of Advice memorandum (*Cox Communications, Inc*., Case No. 17–CA–087612, at 5 (Div. of Advice) (Oct. 19, 2012)), respectively. First, the decision and guidance are not legal precedent, and I must follow current Board law unless or until it has been reversed by the Supreme Court.[13] Nevertheless, Respondent's reliance on them is misplaced. The savings clause in *Tiffany & Co.* specifically tracked the language of the prohibition against disclosing confidential information and provided that the policy did not apply to actions specifically barred by the rule such as communicating with fellow employees or others about wages, benefits or other terms and condition of employment "in the exercise of their statutory rights to organize or to act for their individual or mutual benefit under the [NLRA] or other laws." Similarly, the savings clause addressed in the advice memorandum specifically provided examples of the types of communications permitted by employees. Contrary to Respondent's assertion, and as stated above, its policy does not contain a similar disclaimer.

Next, Respondent asserts that its employees (and everyone else) would readily recognize the legitimate business reasons and special circumstances for which these rules were promulgated, and not believe that they would interfere with Section 7 activity, given the unique role that it has in the security industry of protecting customers' people, property and information. Respondent argues that unlike other employers, Respondent's security guards usually work in a facility owned and operated by one of its customers. As such, they must abide by the rules and policies of the customers, including their demands and expectation for "complete confidentiality and privacy," and in some cases, their requirement that Respondent execute nondisclosure and confidentiality agreements. (Tr. 92–93; R. Br. at 17). In addition, Respondent relies on evidence presented of industry standards and laws requiring confidentiality such as trade industry codes, state regulations and federal regulations such as the Safety Act. Respondent, through Pope, testified that its DHS certification, enabling it to provide security to certain customers which involves fighting terrorism and otherwise ensuring national security, resulted from DHS review of its handbook practices and policies, including its recording and cameras policies. As such, Respondent insists that my finding these rules unlawful "would explicitly conflict with the DHS's certification and sanctioning of those rules, and would run afoul of Supreme Court precedent that requires consideration of 'equally important Congressional objectives,' i.e. national security interests." (R. Br. at 20–21, quoting *Southern S.S. Co.*, 316 U.S. 31, 47 (1942) and citing *Boys Markets, Inc. v. Retail Clerks Union, Local*, 770 U.S. 235, 250 (1970)). Respondent also relies on *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002) to support its argument that the Board is required to defer to local and federal licensing and regulation of the security industry, and must not preempt such laws by a finding that its policies violate the Act. (R. Br. at 21–22). However, the findings in those cases are not applicable here. There is no evidence in this case that DHS required that these rules be placed in Respondent's officer's handbook, nor was there any evidence that DHS or any other government agency or regulation required them to

[13] See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984).

encompass such a far range of activities such that employees would reasonably interpret them to infringe upon their Section 7 rights. Further, Pope acknowledged that Respondent's customers were extremely diverse and included many businesses that did not involve protecting national security, other heightened security interests or the Safety Act.

Respondent also relies on the Board's decision in *Flagstaff Medical Center, Inc.*, 357 NLRB 659 (2011) to support its argument that its special circumstances justify a no photography policy. *Flagstaff Medical Center* is distinguishable as it involved the protection of privacy of hospital patients and their confidential medical records. In *Flagstaff*, the Board found lawful a hospital's rule banning employee use of electronic equipment during worktime and of cameras "for recording or photographing images of patients and/or hospital equipment, property or facilities." *Flagstaff*, above, slip op. at 4–5. The Board found that the "privacy interests of hospital patients are weighty, and [the employer] has a significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography." Id. I find Respondent's insistence that its unique business as a security provider is similar to the medical center in Flagstaff unpersuasive. A finding, as Respondent suggests, that all of its customers have "weighty" privacy interests would run afoul of the applicable legal standards. It would also be contrary to Pope's testimony showing that only some of Respondent's customers, such as hospitals, required heightened security, while others, such as fast food restaurants and other types of businesses did not. And, "[u]nlike the rule in *Flagstaff*, which expressly referenced 'recording images of patients,'" the rules at issue here do not indicate "that they are designed to protect privacy or other legitimate interests," such as sensitive hospital patient information, images of patients or patients themselves. Instead, they generally prohibit all recordings and photography no matter the facility or circumstance. *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op. at 4–5. I also reject Respondent's contention that it would be too inefficient and unduly burdensome for it to have to adjust its handbook rules for its officers working at each of its customers' facilities. The handbook certainly could be modified such that its rules do not invade employees' Section 7 rights. Further, the evidence presented did not support a finding that the Samsung facilities required such heightened security, or that their security needs would not be satisfied with a suitable explanation in its rules.

In *G4S Secure Solutions*, above, slip op. at 7, the Board found no evidence of "identifiable government policy to justify the judge's presumption that all" of the respondent's clients have common privacy concerns of comparable weight," or "privacy interests similar to those articulated in *Flagstaff*." I disagree with Respondent's argument that *G4S Secure Solutions* is not applicable here because it submitted sufficient evidence of its legitimate business reasons for its rules, including documentation of some of its customers' privacy interests and requirements, government regulations and DHS and EEOC requirements. It is true that the Board in *G4S Secure Solutions* found that "such a presumption cannot simply be founded on the fact that the Respondent provides 'security' services." However, as previously stated, I find that the government agency guidelines and regulations presented in this case do not support a finding that all of Respondent's customers have similar privacy concerns of comparable weight such that they justify such a blanket prohibition on recording, picture taking and videotaping that would reasonably be read to prohibit Section 7 activity.

Next, Respondent's assertion that their rules are lawful because no employees have ever complained about them, or been disciplined for violating them, is without merit. The

applicable standard set forth to evaluate these rules is not based on subjective interpretations or evidence of discipline. As stated, maintenance of the rules may be deemed unlawful even absent any evidence of enforcement. *Lafayette Park Hotel*, 326 NLRB at 825. Similarly, I reject the argument that these rules should remain in effect because the Board has previously reviewed Respondent's entire handbook in connection with another unfair labor practice charge involving a solicitation policy in another region. The circumstances in that case, which resulted in a notice posting, are irrelevant to those in this case. (R. Br. at 4, citing R. Exh. 4 and Tr. 65–67).

I have considered all of Respondent's evidence and arguments in support of its special circumstances and justification for its rules, but find they are insufficient to justify the overly broad recording and cameras rules in this case.[14] These rules, even with the savings clause, would reasonably be construed to interfere with employees' Section 7 rights. Therefore, I find their promulgation and maintenance violate Section 8(a) (1) of the Act.

B. Respondent's Rule Not to Discuss an Internal Investigation is Unlawful

On April 26, Respondent, through Shuler and Gray, orally directed Murphy not to discuss with anyone the ongoing investigation, or the underlying incident, which involved Brown's discrimination claim. On May 9, Gray, in response to Murphy's inquiry, Respondent explained the rule in writing:

> [A]ll are barred from talking during the time of the investigation in any circumstance. After the investigation is concluded – if any one starts conversing about it and those conversations become a distraction to the workplace anyone involved in conversing could face disciplinary action in accordance with the handbook.

(GC Exh. 2) In doing so, Gray confirmed that the rule was applicable to all employees, and extended it to circumstances beyond the investigation and in perpetuity.

The General Counsel alleges that Respondent unlawfully promulgated and maintained this rule in response to Murphy's questioning the ban on discussing the investigation, and therefore in order to discourage employees from engaging in protected concerted activity, i.e., discussing the investigation. Therefore, the initial questions here are whether the rule was promulgated in response to employees' Section 7 activity, and whether employees would reasonably construe the rule to prohibit their Section 7 activity. *Lutheran Heritage Village-Livonia,* 343 NLRB at 646–647.

The Board has established that in order for a ban on employee discussions about ongoing investigations to be lawful, an employer must show a legitimate and substantial

[14] Respondent contends that it would have provided additional evidence of its special circumstances if permitted by me. However, Pope was allowed to provide ample relevant testimony in support of Respondent's special circumstances as a security provider. (Tr. 93–105).

business justification that outweighs employees' Section 7 rights. See *Advanced Services, Inc.*, 363 NLRB No. 71, slip op. at 3–4 (2015); *Banner Health System,* 362 NLRB No. 137, slip op. at 2–3 (2015); *Hyundai America Shipping Agency*, 357 NLRB at 874, enfd. in relevant part, 805 F.3d 309 (D.C. Cir. 2015); *Caesar's Palace*, 336 NLRB 271, 272 fn. 6 (2001). In *Banner Health,* the Board emphasized that "it is the employer's burden to justify a prohibition on employees discussing a particular ongoing investigation." The Board also stated that "the employer must proceed on a case-by-case basis;" must not "reflexively impose confidentiality requirements in all cases or in all cases of a particular type; and must determine "that confidentiality is necessary in a particular case…based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality." *Banner Health,* above at slip op. at 3. In *Caesars Palace*, the Board recognized the confidentiality in investigations rule intruded on employees' Section 7 right to discuss with each other internal investigations; however, it found that the employer's need for confidentiality during a drug investigation was a "substantial business justification" that outweighed interference with employees' exercise of their Section 7 rights. Id. The employer in that case showed that it imposed the rule in that case to protect witnesses, and ensure evidence was not destroyed and testimony was not fabricated. Id. The Court of Appeals enforced the Board's order that the confidentiality rule was so broad that the Board "reasonably concluded" that the employer did not establish a legitimate business reason. *Caesar's Palace*, 336 NLRB 271, 272 (2001). In *Hyundai*, the Board adopted the Judge's rejection of the employer's justification that the rule was necessary to protect the victim, witnesses and the accused harasser; "to preserve confidentiality consistent with the [EEOC] guidelines and state and federal courts;" and "to avoid potential liability from accused harassers in defamation and other causes of action;" *Hyundai*, above at 873–874.

The next question is whether Respondent's stated business justification sufficiently and legitimately outweighs employees' Section 7 rights. I find that Respondent has not shown that it conducted an analysis to determine if the integrity of its investigation would have been compromised without the ban on employees discussing it. Pope, Respondent's only witness, who did not interview the employees or issue the directive and rule to Murphy and the other employees, testified that he believed the rule was implemented because Brown complained that people were gossiping about his discrimination case and to prevent harassment.[15] However, Shuler and Gray orally banned Murphy from discussing the investigation during his interview and before Gray issued the written ban. There was no unequivocal, non-hearsay evidence that either the oral or written rule was issued after or in response to Brown's complaint that others were gossiping about him or his case. Nor was there evidence that Gray mentioned justification of the rule or the alleged gossip complaints when she sought advice from McAllister.

Additionally, I find the latter part of the rule is ambiguous in that an employee would reasonably be unsure about how and when a post-investigation conversation would become

[15] Respondent did not call Shuler, Gray or Gonzalez to testify regarding justification for the rule. Although Pope testified that he was involved with updating handbook rules, there was no evidence that he participated in the prohibition on employees discussing the investigation or underlying incident which involved Murphy and other employees.

distracting and whether such conversations would encompass protected activity. "The ambiguity of this admonition gives the employer great discretion in defining it and in deciding when to impose discipline—enough discretion to invalidate the rule under established law." See *Advance Transportation Co.*, 310 NLRB 920, 925 (1993). Thus, any ambiguity in a rule should be construed against the employer. *Lafayette Park Hotel*, 326 NLRB at 825, citing *Norris/O'Bannon*, 307 NLRB 1236 at 1245.

Respondent also argues that it must follow EEOC rules and guidelines in harassment cases in order to maintain confidentiality by keeping records and other information confidential, and by creating an environment where investigation participants can speak freely. However, similar assertions regarding EEOC guidelines and expectations have been rejected by the Board. See *Hyundai*, above, which has not been overturned by the Board or the Supreme Court. Respondent distinguishes this case from *Banner Health System,* above, slip op. at 2; however, I have found that Respondent did not present sufficient justification for its rule.

Thus, I find that Respondent's prohibition on employee discussion of the investigation unlawfully restricts employees' Section 7 rights, and that employees would reasonably understand it to do so. Accordingly, I find that this rule violates Section 8(a) (1) of the Act.

C. Respondent's Anti-Gossip, Idle Talk and Rumor Spreading Policy violates Section 8(a) (1) of the Act

On about May 6, 2016, Respondent promulgated, and has since maintained, the following rule: "Please refrain from gossiping and excessive none [sic] work related idle talk and rumor spreading while in the work place. Remain vigilant and helpful and keep our conversations professional, the work place [is] not the place for gossip and idle talk." (Jt. Exh. 2). The General Counsel alleges that Respondent also issued this rule in response to Murphy's questioning of Respondent's ban on discussing the investigation in order to restrict employees' Section 7 rights. Although the Board has upheld an employer's right to prohibit gossip, I agree with the General Counsel that the Board has also found no gossip policies unlawful where the language was "overly broad, ambiguous, and severely restricted employees from discussing or complaining about terms and conditions of employment." See *Laurus Technical Institute*, 360 NLRB 1155, 1163 (2014) (adopting the administrative law judge's finding that an overly broad no gossip policy violated the Act).

I find that this case is distinguishable from *Hyundai*, in which the Board overturned the administrative law judge's finding that the respondents' rule prohibiting employees from engaging in "harmful gossip" violated the Act. The Board found that the respondent's no gossip rule "merely [prohibited] gossip," defined in Merriam-Webster's Collegiate Dictionary (10th ed. 1999) as "rumor or report of an intimate nature" or "chatty talk," and did not deal with "employee conversations generally, which would implicitly include protected concerted activity." *Hyundai*, above at 861. The no-gossip or idle talk rule in this case issued almost immediately following the oral rule banning employees from discussing the underlying investigation and incident in this case, on the same day as Murphy's email inquiry to Gray and only 3 days before the written ban. In fact, the rule's issuance in such close proximity to

the confidentiality rule regarding investigations and Murphy's inquiry, leads me to believe that Respondent promulgated it in response to Murphy's inquiry about the parameters of the oral ban and concerns about restricting employees from discussing the investigation. I have found that restricting employee discussion about the investigation and incident violated the Act by chilling employees in the exercise of their Section 7 rights. Therefore, I find that in this context, this rule was issued in response to employees' protected activity, and that it would easily lead employees to understand it to restrict their Section 7 rights to discuss terms and conditions of their employment with each other. Indeed, Murphy testified that he and the other officers were concerned with the constraints of this rule.

Further, I find this rule is ambiguous and overly broad in that it not only prohibits mere gossip, but also undefined nonwork related idle talk and rumor spreading in the workplace. The unrestricted rule would reasonably lead employees to construe it to generally limit any non-work related discussions, including those involving subjects such as union organizing, or even about terms and conditions of employment not directly related to their security guard duties. Moreover, it does not restrict such ambiguous talk to work areas and during working time, such that employees would reasonably believe it to ban them from such talk during lunch and other breaks or in nonworking areas. Thus, I agree with the General Counsel that such broad prohibitions, with no defined "areas of permissible conduct in a manner clear to employees" are unlawful. (GC Br. 16–17, citing *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978)). See also *Hyundai*, above at 871 ("employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition").

For the reasons cited above, I also reject Respondent's reliance on *Lytton Rancheria of California,* 361 NLRB No. 148, slip op. at 1, 3 (2014), and similar cases cited, where the Board held that a policy prohibiting gossip about other coworkers, including supervisors, was lawful. (R. Br. 28). Unlike this case, the rules in those cases were not issued in close proximity to other unlawful rules, were not issued in response or to interfere with employees' protected concerted activities and/or not limited to mere gossip or rumor spreading. See *Hills and Dales General Hospital*, 360 NLRB 611, 617 (2014) (employer's right to prohibit gossip does not make the entirety of its rule containing a gossip ban lawful). And, for the reasons set forth above, I reject Respondent's justification for this rule. Pope's belief that it was issued in response to Brown's complaints that people were gossiping about his discrimination claim is insufficient and does not outweigh employees' right to discuss internal investigations involving themselves or other employees. Accordingly, I find that this overbroad and ambiguous rule interferes with employees' Section 7 rights in violation of Section 8(a) (1) of the Act.

CONCLUSIONS OF LAW

By maintaining unlawful handbook rules, prohibiting employees from discussing an internal investigation and promulgating and maintaining a rule prohibiting gossip and excessive nonwork related idle talk and rumor spreading, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section Section 8(a) (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. It must rescind the overbroad, unlawful Security Officer Handbook rules in all of its facilities nationwide, and furnish all current employees employed at its facilities nationwide an insert for its current handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide lawfully worded rules on adhesive backing that will cover the unlawful rules; or publish and distribute to all current employees in its facilities nationwide revised handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully worded rules. This is the appropriate remedy for the violation concerning these unlawful handbook rules given Respondent's admission that these handbook rules have been distributed to all of its employees nationwide, regardless of the type of facility in which they work. As requested by the General Counsel, the required affirmative remedial action properly includes posting a notice to employees regarding the unlawful recording and cameras rules in all of Respondent's facilities nationwide. See *Banner Health System*, 362 NLRB No. 137, slip op. 1 & fn. 3.

However, this general remedy does not extend to all of Respondent's employees in all facilities nationwide with regards to the prohibition on investigation discussions and the rule banning gossip, nonwork idle talk and rumor spreading, as there was no evidence that these rules affected employees outside of Austin, Texas and Respondent's employees working in facilities there.

Respondent must rescind, in writing, the overbroad, unlawful prohibition on employees discussing internal investigations, and advise all current employees working in Austin, Texas facilities in writing (1) that the unlawful prohibition has been rescinded, or (2) provide lawfully worded rules.

Respondent must rescind, in writing, the overbroad, ambiguous, unlawful prohibition on employees from gossiping and excessive nonwork related idle talk and rumor spreading while in the workplace, and advise all current employees working in "Austin, Texas facilities in writing (1) that the unlawful prohibition has been rescinded, or (2) provide a lawfully worded rule.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Securitas Security Services, USA, Austin, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Maintaining overly broad, unlawful recording and cameras policies in its Security Officer Handbook, which prohibit its employees from and subject them to discipline for taking pictures while on duty unless required by post orders or when directed by their supervisor or manager, including with use of cell phone cameras and/or any other photographic or video devices.

b. Prohibiting employees from talking to each other or anyone else about internal investigations.

c. Promulgating and maintaining a rule prohibiting employees from gossiping and engaging in excessive nonwork related idle talk and rumor spreading while in the workplace.

d. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from this Order, rescind or modify the language in its recording and camera policies to the extent that it bars employees from taking pictures while on duty unless required by post orders or when directed by their supervisor or manager, including use of cell phone cameras and/or any other photographic or video devices.

b. Within 14 days from this Order, rescind the prohibition on employees from discussing with anyone internal investigations.

c. Within 14 days from this Order, rescind or modify the rule prohibiting employees from gossiping and excessive nonwork related idle talk and rumor spreading while in the workplace.

d. Furnish all current employees at all of Respondent's facilities nationwide with inserts for the Security Officer Handbook that (i) advise that the unlawful rules have been rescinded, or (ii) provide the language of lawful rules on adhesive backing that will cover or correct the unlawful rules; or publish and distribute a revised Security Officer Handbook policy that (i) does not include the unlawful rules, or (ii) provides the language of lawful provisions.

e. Within 14 days after service by the Region, post copies of the attached notice marked "Appendix A" at all facilities where its employees work or are assigned in Austin, Texas, and the attached notice marked "Appendix B" at all of the facilities nationwide where it has distributed its Security Officer Handbook to its employees.[17] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 9, 2015.

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2017

Donna N. Dawson
Administrative Law Judge

17 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain provisions in our Security Officer Handbook which prohibit you from and subject you to discipline for taking pictures while on duty unless required by post orders or when directed by your supervisor or manager, including with use of cell phone cameras and/or any other photographic or video devices.

WE WILL NOT prohibit you from talking to each other or anyone else about internal investigations.

WE WILL NOT prohibit you, orally or in writing, from gossiping and engaging in excessive nonwork related idle talk and rumor spreading while in the workplace.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind or modify the recording and cameras policies in the Security Officer Handbook to the extent that they bar you from taking pictures while on duty unless required by post orders or when directed by their supervisor or manager, including with use of cell phone cameras and/or any other photographic or video devices.

WE WILL rescind the prohibition on you discussing with each other or anyone else internal investigations.

WE WILL furnish you with inserts for the Security Officer Handbook that (i) advise that the unlawful rules have been rescinded, or (ii) provide the language of lawful rules on adhesive backing that will cover or correct the unlawful rules; or publish and distribute a revised Security Officer Handbook policy that (i) does not include the unlawful rules, or (ii) provides the language of lawful provisions.

SECECURITAS SECURITY SERVICES, USA

(Employer)

Dated _____ By _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-176006 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2941.

APPENDIX B

NOTICE TO EMPLOYEES

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An Agency of the United States Government

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FEDERAL LAW GIVES YOU THE RIGHT TO

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Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

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WE WILL furnish you with inserts for the Security Officer Handbook that (i) advise that the unlawful rules have been rescinded, or (ii) provide the language of lawful rules on adhesive backing that will cover or correct the unlawful rules; or publish and distribute a revised Security Officer Handbook policy that (i) does not include the unlawful rules, or (ii) provides the language of lawful provisions.

SECURITAS SECURITY SERVICES, USA

(Employer)

Dated _____ By _____

(Representative) (Title)

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-176006 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

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